JACOB LIM HOONG TEONG & ORS

v.

WONG JUN HIANG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KL REKHRAJ JC
[CIVIL SUIT NO: D1-22-421-95]
15 JANUARY 1997

ARBITRATION: *Agreement - Arbitrability - Effect of - Jurisdiction of court - Arbitrator - Stay of proceedings - Arbitration Act 1952, s. 6 - Injunction in the interim period - Arbitration Act 1952, s. 13(h)*

CONTRACT: *Arbitration - Agreement referring to arbitration - Arbitration clause - Assignment with consent of plaintiffs - No cause of action against assignor - Contracts Act 1950, s. 63 - Injunction - Balance of convenience*

CIVIL PROCEDURE: *Arbitration - Effect of arbitration clause - Declaration - Application for - Injunction - Arbitration - Balance of convenience - Interim injunction against management of company - Jurisdiction - Arbitration clause - Pleadings - Striking out claim and action - Rules of the High Court 1980, O. 18 r. 19*

The plaintiffs had entered into a shareholders agreement with the 1st and 2nd defendant ('the shareholders agreement') in respect of the 4th defendant company.

Clause 3B of the shareholders agreement provided that the approval of the Security Commission of Malaysia ('the SC') was required. It further provided that in the event of the SC's approval being refused or not obtained within 90 days from the date of this agreement or such terms and conditions contained in the SC's approval shall be unacceptable to either the 1st or 2nd defendant, the original shareholders shall buy back all the shares presently held by the 1st and 2nd defendant in the 4th defendant at a stipulated purchase price ('the purchase price').

Clause 23 of the shareholders agreement also provided that "If any dispute ... among the parties hereto of or in relation to this agreement or the breach, termination ... the parties concerned shall exert their best endeavors to settle such dispute ... and if they are unable to reach any agreement, then the question shall be settled by arbitration .. which decision shall be final and binding upon the parties thereto."

Subsequently, by a deed of assignment, the shareholders agreement was absolutely assigned to the 3rd defendant with the consent of the plaintiffs. A dispute then arose between the parties on the interpretation of cl 3B of the shareholders agreement as to whether the time 90 days was the essence of the agreement; and/or the right to buy back was only reserved in the 1st and 2nd defendant upon their demand and not a right in the plaintiffs.

The plaintiffs filed a writ against the defendants claiming, *inter alia*, for: (i) a declaration that the shareholders agreement had been terminated pursuant to cl 3B as the approval of the SC was not obtained within the 90 days period; (ii) an order that the 1st and 2nd defendants deliver to the plaintiffs the share certificates for the shares in the 4th defendant together with the duly executed memorandum of transfer in consideration for the payment of the purchase price by the plaintiffs to the 3rd defendant; (iii) that the defendants to provide to the plaintiffs an account of the financial status of the 4th defendant for the period they were in control of the 4th defendant; and (iv) an order that the 1st, 2nd and 3rd defendants and their respective nominees tender their resignations from the Board of Directors of the 4th defendant company.

The plaintiffs also filed a summons in chambers for: (i) the appointment of receivers and managers over the assets of the 4th defendant; and (ii) an injunction to restrain the defendants, their agents or servants either directly or through their nominees from exercising any rights or powers as directors and shareholders of the 4th defendant.

The defendants through their respective solicitors took out separate summonses claiming that: (i) all proceedings should be stayed under s. 6 of the Arbitration Act 1952 ('the Act') pending reference of the plaintiffs' claim to arbitration; and (ii) the writ of summons and the statement of claim of the plaintiffs be struck out pursuant to O. 18 r. 19 of the Rules of the High Court 1980.

Counsel for the 1st and 2nd defendant contended that in view of the absolute assignment by the 1st and 2nd defendant of the relevant sale and purchase agreement and the shareholders agreement to the 3rd defendant with the consent of the plaintiffs, the plaintiffs could no longer maintain any action against the 1st and 2nd defendant. Instead, the plaintiffs could only proceed against the 3rd defendant. Also, it was argued that pursuant to s. 63 of the Contracts Act 1950, the contract between the plaintiffs and the 1st and 2nd defendant need not be performed as the plaintiffs had accepted performance from the 3rd defendant in substitution thereof.

Held:

[1] On the facts, the plaintiffs were claiming against the 1st and 2nd defendants on an agreement which had since been absolutely assigned to the 3rd defendant, with the consent of the plaintiffs. The plaintiffs therefore had no cause of action against the 1st and 2nd defendants as the assignment operated as an estoppel by deed and destroyed the cause of action, if any. By that consented deed, the plaintiffs had undertaken not to assert their contractual rights against the 1st and 2nd defendants and in fact had released them of their original intended bargains in favour of the substituted parties. The plaintiffs therefore had no cause of action against the 1st and 2nd defendants and accordingly the plaintiffs' claim against them had to be struck off with costs.

[2] By virtue of cl 23 of the shareholders agreement, the parties had expressly chosen and reserved for themselves arbitration as a means to settle their differences in respect of the shareholders agreement and the courts should give effect to and uphold the arbitration clauses. The parties were simply obliged to their commitment and should refer the dispute to arbitration. The court had no intentions to trespass into the agreed territorial jurisdiction of the arbitrator. Accordingly, the plaintiffs were directed first to exhaust their action before the arbitrator and not in this court.

[3] In respect of the plaintiffs' claim for an interim injunction, the court was guided with the balance of convenience as a basis. The granting of an injunction without the appointment of a receiver to administer the present healthy state of affairs of the 4th defendant would totally paralyse the company which had been turned from a total liability company to one with a large credit balance.

[4] The granting of an injunction is a discretionary relief.

[Order accordingly.]

Cases referred to:

SL Sethia Liners Ltd v. State Trading Corp of India [1986] 2 All ER 39 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah Ors [1995] 1 CLJ 293 ***(cit)***

Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat [1996] 1 CLJ 231 ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Teng (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Legislation referred to:

Arbitration Act 1952, ss. 6, 13(h)

For the 1st, 3rd, 4th plaintiff - Lorraine Cheah; M/s Shearn Delamore & Co
For the 1st & 2nd defendants - Manjit Singh; M/s Sri Ram & Co
For the 3rd & 4th defendant - Cyrus Das & K Mohan; M/s Shook Lin & Bok

JUDGMENT

KL Rekhraj JC:

Facts

On 8 February 1994 the plaintiffs together with Encik Hirman bin Abu entered into a shareholders agreement with the first and second named defendant (hereinafter called the shareholders agreement) touching the fourth named defendant.

Under **cl. 3B** of the said shareholders agreement, the approval of the Security Commission of Malaysia (SC) was required; and by cl. 3B(d) it was reserved that "In the event of the Security Commission approval being refused or not obtained within 90 days from the date of this agreement or such terms and conditions contained in the Security Commission approval shall be unacceptable to either the first or second defendant; the parties hereto hereby agree that a the original shareholders shall **buy back** all the shares presently held by the first and second defendants in the fourth named defendant company at the total purchase price of RM3,520,000 (hereinafter called the purchase price) and the purchase price together with all monies expenses and costs incurred by the first and second named defendants pursuant to or arising from this agreement or the termination thereof shall be paid to the first and second named defendants by the original shareholders **upon demand** and thereafter this agreement shall be null and void and of no effect; and no party hereto shall thereafter have any claim against the other".

Further by **cl.** 23 of the said shareholders agreement it was also provided,

> (i) If **any dispute**, controversy or claim arises between or among the parties hereto out of or in relation to this agreement or the breach, termination or invalidity hereof, the parties concerned shall exert their best endeavours to settle such dispute, controversy or claim by mutual consultation;
>
> (ii) If the parties should be unable to reach mutual agreement to settle the dispute, controversy or claim, **the question shall be settled by Arbitration.** That **award** of the arbitration **shall be final and binding upon the parties hereto.**

Subsequently on 17 April 1994 before the arising of any dispute, by a Deed of Assignment, the said hareholders agreement was **absolutely assigned to the third named defendants** with the plaintiffs expressly signing and agreeing

to accept the third named as the assignee in place of the assignors; **as if the assignees had been named and made a party to the said sale and purchase agreement and to the shareholders agreement.**

A dispute arose between the parties on the interpretation of cl. 3B as to whether the time 90 days was the essence of the agreement; and/or the right to buy back was only reserved in the first and second named defendants upon their demand and not a right in the plaintiffs.

The plaintiffs filed a writ claiming for:

(a) A declaration that the shareholders agreement has been terminated pursuant to cl. 3B as a result of the failure to obtain within the 90 days from the date of the shareholders' agreement, the approval of the Security Commission for the issue and allotment of the additional 6,363,636 shares in the fourth defendant, company;

(b) For an order that the first and second named defendants do deliver-up to the plaintiff; the share certificates for the 2,800,000 shares in the fourth defendant of which 1,400,000 each are currently registered in the names of the first and second named defendants respectively; together with duly executed memorandum of transfer for these 2,800,000 shares in consideration for the payment of RM3,520,000 to be paid by the plaintiffs to the third defendant;

(c) That the defendants do provide an account to the plaintiffs in respect of the financial status of the fourth defendant for the period when the defendants were in control of the fourth defendants in accordance with cl. 12.4 of the shareholders agreement;

(d) For an order that the first defendant and his nominee together with the nominees of the second and third defendants do immediately tender their resignation from the Board of Directors of the fourth defendant company;

(e) Damages;

(f) Costs;

(g) Such further and other relief as the court deems fit.

The plaintiffs by their Encl. (10) filed a summons in chambers for:

(a) the appointment of Receivers and Managers over the Assets to manage the affairs of the fourth named defendants; and with liberty reserved in them to do all such acts and things as may be necessary for the purposes described in the various paragraphs; and to enter upon the fourth named

defendants premises, to take possession, custody and control of all the assets.

(Note: This prayer for Receivers and Managers was discontinued by the plaintiffs solicitors at the hearing on 12 December 1996.);

(b) that the respondents (defendants) whether by themselves, their agents or servants or otherwise be restrained from, and an injunction be granted restraining them either directly or through any nominee from acting or exercising any rights or powers as Directors and shareholders of the fourth named defendants.

The defendants through their respective solicitors took out separate summonses supported by affidavits Encls. (13) and (15) and Encls. (29) and (31):

(i) that all proceedings herein be stayed under s. 6 of the Arbitration Act 1952 pending reference of the plaintiffs claim herein to arbitration; and

(ii) for an order pursuant to O. 18 r. 19 of the Rules of the High Court 1980 and/or under its inherent jurisdiction that the writ of summons and the statement of claim of the plaintiffs be struck out on the ground that:

(a) it discloses no or no reasonable cause of action; and/or

(b) it is frivolous or vexatious; and/or;

(c) it is otherwise an abuse of the process of the court;

(d) the action herein be dismissed;

(e) the costs be paid by the plaintiffs forthwith.

The first and second named defendants counsel Mr. Manjit Singh contended that:

(i) In view of the absolute assignment by the first and second named defendants to the third named defendant of all their rights, interest, title and benefit together with their burden and obligation in the relevant sale and purchase agreement and the shareareholders agreement; with the consent concurrence and acknowledgment of the plaintiffs, the plaintiffs can now no longer maintain any action against them;

as they have divested the benefit and burden therein to the third defendant The plaintiffs can only instead proceed against the third named defendants.

(ii) That pursuant to s. 63 of the Contracts Act 1950, the contract between the plaintiffs and the first and second named defendant need not be performed; as the plaintiffs have accepted performance from the third defendant in substitution of the obligations of the said first and second defendants; and thus cannot enforce these contracts against them; and as

such the plaintiffs have no cause of action against them; and prayed that the claim was not only frivolous, and vexatious but an abuse of the process of this court; and accordingly sought to be dismissed with costs.

Dr. Cyrus Das acting for the third and fourth named defendants submitted to persuade this court to proceed to interpret cl. 3(b) of the shareholders agreement to see whether in reality there is a dispute notwithstanding there was an alternative prayer for a stay of proceedings under s. 6 of the Arbitration Act which reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration or any person claiming through or under him; in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings and the court, **if satisfied** that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order for staying the proceedings.

Dr. Das relied heavily on the principle stated in the *SL Sethia Liners Ltd. v. State Trading Corp of India* [1986] 2 ALL ER p. 395 at 396 and 397 and called upon this court to interpret it summarily since there was no other related dispute of fact; other than of law which I could proceed to interpret it; but if I was satisfied that there was a triable issue and the dispute between the parties fell within the intended scope; then the court should not adjudicate it instead refer it to arbitration.

He then went on to address that if there was infact a dispute; then whether the plaintiffs were entitled to an **injunction** in the interim period; under s. 13(h) of the Arbitration Act 1952 pending the disposal of the arbitration proceedings; with particular emphasis:

(i) The timing of the application was of an importance as it having been made at a time when the agreements have been performed to completion, with the plaintiffs being paid RM3,520,000; and the defendants have in addition thereto injected hinds in the sum of RM11.3 million since taking over the control and management of the fourth defendant company.

(ii) In substance, this injunction if granted would have the effect of paralysing the fourth named defendant by unseating a majority of its directors and leaving the company without any government. In essence the injunction as sought is not preventive but having mandatory effects.

(iii) The abandonment of the prayer by the plaintiffs of the appointment of Receivers; and at the same time seeking injunction; the effect of which would be to leave the company without any Board Management; shows a reckless and irresponsible attitude of the plaintiffs. It is a factor the court has to consider in evaluating the balance of convenience to see whether it helps any body or is disruptive in nature.

(iv) That the plaintiffs have not shown any justification for the injunction sought in terms of any harm or hardship that shall be caused to them in the interim, if not granted.

(v) The plaintiffs have not made out any case that their continuing investment of sixteen per cent in the company shall be in jeopardy.

(vi) On the other hand there is sufficient evidence before this court that the fourth-named defendant has since the sale and purchase agreement has turned around and is profitable.

The 1994 accounts show a profit of about three million ringgit and there is no denial of this by counter-affidavit. (This is infact admitted by Miss Cheah counsel for the plaintiffs). This improvement in development equally benefits the plaintiffs on their sixteen per cent shareholding.

(vii) The present healthy financial position of the company ought to be a contrasted in favour of the defendants after taking into consideration the position prior to January 1994, when the third defendants' group took over the control and management.

(viii) That there are no allegations to the detriment of the company and its management and the plaintiffs have at all tines been having their nominated Director on the Board of the defendants; and who has not at anytime complained of any wrong-doings.

(ix) The financial position before the takeover is as given in para. 4 – Encl. (18C) at p. 25, is certainly a sad state of liabilities – in red by RM3 million; but within a year later, under the defendants management; the company has showed a profit of about three million – see para. 33(2) of Encl. 18(c) and the accounts as set at p. 217

(x) It should be noted the plaintiffs are now seeking to buy-back the shares of the company at the original price invoking cl. 3(b) when it is far more profitable, from that when they sold in liability.

(xi) The defendants after the takeover have released the plaintiffs of their personal guarantees in respect of the financial transactions over the purchase of the golf-course land; and the second debenture created by the fourth named defendant company in favour of AMFD has been restructured; with the release of the guarantors by 1 July 1994 - prior to

the Security Commission's consent – which was given on 2 May 1995. The terms of the Security Commission were accepted by the purchasers, and acted upon by them.

(xii) The above factors show that notwithstanding the delay in the obtaining of the Security Commission approval; the plaintiffs have acquiesced in the takeover of the fourth defendant by the third defendant; in allowing them to inject the much-needed capital. Indeed the plaintiffs have immediately benefitted from this takeover by the release of their guarantees to AMFD even before the Security Commission approval letter. They have therefore never been at any time prejudiced by the delay in the obtaining of the Security Commission consent letter. The equities are not in favour of the plaintiffs when considering the balance of justice. (Case - *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors.* [1995] 1 MLJ p. 193.)

(xiii) The court should consider to maintain the *status quo* – the granting of the injunction will instead change the *status quo.*

(xiv) If one looks at the time sequence namely, the date of the agreement as 8 February 1994; the expiry of ninety (90) day period was to be 8 May 1994. The plaintiffs were discharged of their guarantee liabilities on 1 July 1994 (two months later).

That this action is in frivolity and not pursued with a desire to obtain genuine relief and accordingly prayed that the injunction be refused and instead the present *status quo* be maintained.

It is clear from the facts that the plaintiffs are claiming against the first and second-named defendants on an agreement which has since been absolutely assigned to the third and fourth-named defendants, with the consent of the plaintiffs. The plaintiffs therefore have no cause of action against them; as the assignment operates as an **estoppel by Deed**; and destroys the cause of action, if any. By that consented Deed, the plaintiffs have undertaken not to assert their contractual rights against the first and second defendants; and in fact have released them of their original intended bargains in favour of the substituted parties. I hold that the plaintiffs have no cause of action as such and I accordingly allowed the first and second named defendants application to strike off the plaintiffs claim against them with costs to be taxed and paid forthwith.

As for the third and fourth named defendants applications:

(i) To strike off the plaintiffs cause of action under O. 18 r. 19 of the Rules of the High Court and/or in the alternative;

(ii) To stay of the proceedings pending the exhausting of the arbitration proceedings.

I held that in the face of an admission by Dr. Cyrus Das of there being a dispute within the ambit of cl. 23 of the shareholders agreement which provides, "If **any** dispute ... among the parties hereto of or in relation to this agreement or breach termination ... the parties concerned shall exert their best endeavours to settle **such dispute** ... and if they are unable to reach any agreement; then the said dispute shall be settled by arbitration.".

Here the parties have expressly chosen and reserved for themselves arbitration as a means to settle their differences touching on the agreement and in the light of the two Malaysian Supreme Court decisions:

(a) *Tan Kok Cheng & Sons Realty Co. Sdn Bhd. v. Lim Ah Pat (t/a Juta Bena)* [1996] 3 MLJ 273; and

(b) *Seloga Jaya Sdn. Bhd. v. Pembenaan Keng Teng (Sabah) Sdn. Bhd.* [1994] 2 MLJ 97;

which have affirmed that the Courts should give effect to and uphold the arbitration clauses, I am not prepared to consider the third and fourth named defendants application to strike off the claim, as being without a cause of action; though I was strongly persuaded by the counsel to do so under the principles of *SL Sethia Liners Ltd. v. State Trading Corp. of India Ltd.* [1986] 2 All ER p. 395.

I therefore held that the parties were simply obliged to their commitment and should refer the dispute to arbitration and this court has no intentions to trespass into the agreed territorial jurisdiction of the arbitrator, and accordingly directed the plaintiffs, that they must first exhaust their action before the arbitrator; and not in these courts.

As for the plaintiffs; they have asked for two prayers to this court:

(i) The appointment of a Receiver pending the disposal of the cause of action. (This prayer was discontinued with its withdrawal);

(ii) An interlocutory relief under s. 13(6)(h) of the Arbitration Act 1952 for an interim injunction to injunct the defendants from managing the fourth named defendants.

On the totality of the facts before me and in the avoidance of injustice to a party; the court invariably guided itself with the balance of convenience as a basis. I note that the granting of an injunction as sought; without the appointment of a Receiver to administer the present healthy state of affairs

of the fourth-named defendants would totally paralyse the company which hitherto had been turned from a total liability company; to a company with a large credit balance; improved performance in results, flourishing membership with a strong management, comprising of a nominated member of the plaintiffs on the defendants Board as a Director to protect their (plaintiffs) share interest; with no danger or any allegations on their part ie, the plaintiffs part) that the assets of the company shall be dissipated by the defendants continuous management; unless restrained by an injunction.

As the granting of an injunction is a discretionary relief – not an absolute right a *debito justicia* I held that there were no justifiable circumstances to exercise my discretion in granting; as it would do more harm than any good; and I accordingly dismissed the prayer for an injunctive relief, with costs to the defendants to be taxed and paid forthwith.

I further ordered that the plaintiffs cause of action filed in this court against g the third and fourth-named defendants be stayed pending the disposal of the dispute upon a reference to the arbitrator; and that in the interim period; the present *status quo* of the management in the hands of the defendants be maintained; and the defendants be made accountable for any defaults in the event the arbitrator's award is made in favour of the plaintiffs.

Reported by Ling Hea Hoon